No. 241

In the

Supreme Court of the United States

OCTOBER TERM, 1942

KANSAS CITY LIFE INSURANCE COMPANY, a Corporation,
PETITIONER,

v.

CARRIE J. PARFET, Administratrix of the Estate of George W. Parfet, Deceased.

REPLY BRIEF.

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STATUTES AND DIGESTS.

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REPLY BRIEF.

Petitioner contends that a fair trial was had in this case and that the error on which the Circuit Court reversed was purely technical. Moreover, the Circuit Court depended in reversal on a wholly mistaken interpretation of Colorado law.

(1) Respondent says that the jurisdiction of the Supreme Court to review on certiorari is to be exercised sparingly.

This is conceded. Rule 38 5(b) defines the character of cases in which certiorari will be granted. This case falls clearly within the first three and probably within the first four of the grounds for certiorari set forth in that rule, to-wit: A conflict in the decision sought to be reviewed with the decisions of other circuits on the same matter;

the decision of an important question of local law in a way probably in conflict with applicable local decisions; the decision of an important question of federal law which has not been but should be settled by this court; and, probably, the decision of a federal question in a way in conflict with applicable decisions of this court.

(2) Respondent contends that the writ should not be granted to review evidence.

The court in this case is being asked to review certain specific rulings of law. The discussion of the evidence is merely incidental to assist the court in determining the applicable rules of law.

(3) Respondent's brief contends that a conflict in the decisions of circuit courts on questions controlled by state law is not ground for granting certiorari.

The question as to whether it is reversible error for a United States judge to answer a question of the jury as was done in this case is clearly not one of state law. The circuits moreover are in conflict as to whether in the determination of the sufficiency of the evidence to take the case to the jury the federal court is bound by the state rule, as was held by the Circuit Court of Appeals in this case.

WHERE THE RESULT IS CORRECT AND NO OTHER VERDICT COULD BE SUSTAINED UNDER THE EVIDENCE, INTERVENING ERRORS DO NOT WARRANT REVERSAL.

Respondent's brief contends that the Circuit Court's statement of the Colorado rule on presumption and burden of proof is correct.

A brief examination of the authorities is convincing that it is in conflict with the applicable decisions of the Colorado Supreme Court, the highest court in the state.

This question arises in the following manner: Petitioner contended in the Circuit Court of Appeals, first, that the error of the judge in communicating with the jury

outside the presence of counsel was harmless since the categorical answer given to the jury's question was correct and had been covered in the instructions already given, and, second, no intervening errors in connection with the jury could have been prejudicial because under the evidence plaintiff failed to sustain the burden of proving accident and so no other verdict was possible than that actually returned. The lower court so held in denying respondent's motion for a new trial and the fact is obvious from an examination of the undisputed evidence in the case. As is said in *5 Corpus Juris Secundum*, § 1676, p. 805:

> "Where the judgment is clearly correct upon the merits, intervening errors will not operate to reverse the judgment. * * * Thus the unsuccessful party cannot complain of any error committed at the trial where not entitled to succeed in any event; and where no other verdict or conclusions could be sustained, or no other judgment properly be entered, a reversal will not be warranted because of intervening errors. If appellee is entitled to an affirmative charge in his favor, errors intervening at the trial afford no ground for reversal."

In 3 Am. Jur., § 1111, p. 634, it is said:

> "One test that has been frequently held determinative of the prejudicial character of error in instructions is the correctness of the result; if that is correct, the error is not reversible."

Again, in *Chicago, Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U. S. 377, 28 L. Ed. 787, this court said in the closing paragraph of the opinion (p. 794):

> " * * * The charge on the other points is immaterial; whether correct or erroneous, it could not have changed the result; the verdict of the jury could not have been otherwise than for the plaintiff."

To the same effect are: *Tua v. Carriere*, 117 U. S. 201,

29 L. Ed. 855, 858; *Walbrun v. Babbitt,* 83 U. S. 577, 21 L. Ed. 489; *Barth v. Clise,* 79 U. S. 400, 20 L. Ed. 393; *Maynard v. Finney,* 92 Fed. (2d) 454, 455; *Scofield v. Scofield,* 89 Colo. 409, 3 Pac. (2d) 794; *Taylor v. Bastian,* 26 Colo. App. 185, 186; *Richmond v. Virginia Bonded Warehouse Corp.,* 148 Va. 60, 138 S. E. 503.

THE CIRCUIT COURT MISINTERPRETS THE COLORADO CASES.

Both the Circuit Court of Appeals and respondent in effect concede that this would be true except for what they claim is a special rule in Colorado relieving plaintiff from the burden of proving accident and requiring defendant to prove suicide beyond a reasonable doubt. Respondent and the Circuit Court of Appeals erroneously assume that the rule in a straight life insurance case and that in an accidental death case are identical under Colorado law. The Colorado Supreme Court has clearly pointed out the distinction in *Capitol Life Ins. Co. v. Di Iullo,* 98 Colo. 116, where it says (pp. 118, 119):

> "In the case of a straight life insurance policy proving for the payment of money upon the death of the insured the condition upon which liability depends is the death of the insured, and, his death being shown, the loss comes within the coverage of the policy, * * * .
>
> " * * * Where, however, a policy provides for the payment of money upon the death of the insured as a result of accident, there are two conditions upon which liability depends; namely, (1) death of the insured and (2) accidental cause of such death. * * * *It may just as reasonably be held that on a straight life insurance policy, providing for the payment of money on the death of the insured, the insurer is liable where there has been no death, as to hold that on a policy providing that money shall be paid in case of death by accident, the insurer is liable where there has been no accident.*" (Italics supplied.)

This is in accord with the federal cases including those of the United States Supreme Court set forth in petitioner's opening brief at pp. 29-32 inclusive.

The most that can be claimed by respondent from the Colorado cases cited by her is that proof of death by unexplained, external violence makes a prima facie showing of accidental death. In this case petitioner met that showing first by the corner's death certificate showing suicide, to which the Colorado statute[1] gives the effect of prima facie proof of the matters contained therein, and, second, by the decedent's own explanation both in words and action of what happened and why he killed himself. Respondent and the Circuit Court of Appeals contended that it was necessary for defendant to overcome the original prima facie case of accidental death by proof virtually beyond a reasonable doubt. This is in direct conflict with the settled law of the State of Colorado as laid down by the Supreme Court in *Roeber v. Cordray,* 70 Colo. 196, where the court said (p. 198):

> "'* * * It is perfectly clear, therefore, that to break the force of a prima facie case it is not necessary that the contrary shall be established by a preponderance of the evidence, but that it is sufficient if, from the evidence pro and con, the plaintiff cannot be said to have a preponderance upon his side of the issue.'"

Respondent's and the Circuit Court's reliance on a straight life insurance case[2] demonstrates a complete misunderstanding and misinterpretation of the applicable decisions of the Colorado Supreme Court. A glance at the cases cited by respondent is conclusive on this point.

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[1]Chap. 78, § 128, Colo. Stat. Ann., 1935: "* * * such copy * * * shall be prima facie evidence in all courts and places of the facts stated therein."

[2]The Circuit Court relied solely on the straight life insurance case of *Prudential Life Ins. Co. v. Cline,* 98 Colo. 275, 57 Pac. (2d) 1205.

The first case cited by respondent is *Germania Life Ins. Co. v. Ross Lewin,* 24 Colo. 43, a straight life insurance case in which no question of accident was involved and which obviously under the ruling of the Supreme Court heretofore cited has no bearing on the question here.

The second case is *Rex v. Continental Co.,* 96 Colo. 467. In that case accidental death was admitted and the court merely held that the burden was on the defendant to prove that decedent was outside the line of employment covered in the policy if it would avoid payment on that ground.

The case of *Preferred Accident Ins. Co. v. Fielding,* 35 Colo. 19, obviously does not sustain the Circuit Court's interpretation of the Colorado law. The court merely held there that when the evidence was consistent with accidental death and with the presumption against suicide, the case should go to the jury. It certainly did not hold that the jury must find the death accidental if there was any possible hypothesis on which it could do so. Yet, that is what the Circuit Court here says is the rule.

Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, decided in 1898, is an old decision of the Colorado Court of Appeals—a court long since abolished. The court there held that it was improper to grant a non-suit where there was a showing of death by wholly unexplained, external violence since that alone constituted a prima facie showing of accidental death. The later decisions of the Colorado Supreme Court—*Roeber v. Cordray,* (1921) 70 Colo. 196; *Capitol Life Ins. Co. v. Di Iullo,* (1935) 98 Colo. 116; and *North American Accident Co. v. Cavaleri,* (1935) 98 Colo. 565—all indicate clearly that the mere making of a prima facie case does not shift the burden of proof.

Respondent further cites the case of *Bickes v. Travelers' Ins. Co.,* 87 Colo. 297, which held that proof by death by unexplained, violent external means makes a prima facie case sufficient to prevent non-suit. To the same effect is *Occidental L. Ins. Co. v. N. S. Nat'l Bank,* 98 Colo. 126.

Respondent also cites *Occidental Life Ins. Co. v. Graham*, 22 Fed. (2d) 528, but mistakenly asserts that the policy involved was an accident policy. It was not. It was a straight life insurance policy which obviously has no bearing on the problem here.

The highest court in Colorado has repeatedly asserted that in an accidental death case the burden is on the plaintiff to prove accident, that a prima facie showing of accident is made when death by unexplained, violent external means is shown, but that in order to overcome a prima facie case it is not necessary to prove the contrary conclusively or beyond a reasonable doubt or even by a preponderance of the evidence. On the contrary, the highest court of the state has clearly and plainly asserted that the burden remains on the plaintiff, taking all the evidence into consideration, to prove accidental death by a preponderance of the evidence and if he fails to do so, he cannot recover.

The statement of the Circuit Court, therefore, to the effect that defendant must prove suicide in effect beyond a reasonable doubt is directly contrary to the settled rule of the Colorado Supreme Court. Yet it is on the basis of this alleged Colorado rule that the court reversed in this case. Considering a purely speculative and conjectural case as to how an accident might have happened, the Circuit Court disregarded the long line of cases cited on pages 17-19 of petitioner's opening brief and based its decision on this supposed pecularity of Colorado law.

THE CIRCUITS ARE IN CONFLICT AS TO WHETHER A COMMUNICATION BETWEEN JUDGE AND JURY, AS IN THIS CASE, CONSTITUTES REVERSIBLE ERROR.

Finally, respondent contends that there is no conflict among the circuits on the question as to whether it is reversible error per se to communicate with the jury outside the presence of counsel. She amazingly contends that the only case similar in facts to this is the case of *Stone v.*

United States, (C. C. A. 6) 113 Fed. (2d) 70. That was a criminal case, not a civil case, and was one in which there was an attempt to bribe a juror. The facts do not even remotely resemble those in this case.

Opposing counsel would distinguish all other cases of communication with the jury on his mistaken assumption that the court in this case communicated by means of a deputy marshall and not by a bailiff. The Circuit Court's ruling relies on no such point. Said the Circuit Court of Appeals (R., pp. 153, 154):

> "After the case had been finally submitted to the jury, and while the jury was engaged in their deliberations, they handed to the bailiff a note to the judge in which inquiry was made as to whether it was necessary that a motive be shown by the evidence in order to warrant the jury in finding that the death was by suicide. The bailiff handed the note to a deputy United States Marshal; he took it to the residence of the judge and there handed it to him; the judge directed the deputy to answer verbally 'no'; and that was accordingly done."

It clearly relies on no such distinction as is sought to be made by opposing counsel in his interpretation of the court's statement of facts.

CONCLUSION.

We respectfully submit that the question whether jury verdicts are to be overturned on technical errors and new trials ordered in the federal courts, where the trial has been fair and the verdict just, is one of great public importance. That question is squarely raised in this case.

This court itself has sought to meet such cases in Rule 61 of its Rules of Civil Procedure, and Congress has attemped to curb the reign of technicality by statutory enactment.

A clearer case of a just verdict, involving a complete failure by plaintiff to sustain her burden of proof, would be hard to find. Neither the Circuit Court nor respondent seriously claim that plaintiff sustained the burden of proving accidental death. Instead, they rely on a palpably erroneous interpretation of Colorado law and insist that defendant must prove the contrary beyond a reasonable doubt.

If in such a case—where the jury really had no function—a technicality in the manner—not the substance—of an instruction can require parties to retrace the long road of litigation, call back a jury, bring in the witnesses, reargue the case, and once more appeal to the Circuit Court and then to this court, with, it may be, some new technicality, then indeed the statute and the rule are but feeble weapons of justice.

Respectfully submitted,

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